(S E R V E D)
(October 31, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 87-26

AGREEMENT NO. 202-010689-027;
TRANSPACIFIC WESTBOUND RATE AGREEMENT

LOYALTY CONTRACTS

DOCKET NO. 88-1

AGREEMENT NO. 202-000093-040;
NORTH EUROPE-U.S. PACIFIC
FREIGHT CONFERENCE AGREEMENT

AGREEMENT NO. 202-010270-024;
GULF-EUROPEAN FREIGHT
ASSOCIATION AGREEMENT

AGREEMENT NO. 202-010656-024;
NORTH EUROPE-U.S. GULF FREIGHT
ASSOCIATION AGREEMENT

AGREEMENT NO. 202-010636-028;
U.S. ATLANTIC-NORTH EUROPE
CONFERENCE AGREEMENT

AGREEMENT NO. 202-010637-025;
NORTH EUROPE-U.S. ATLANTIC
CONFERENCE AGREEMENT

AGREEMENT PROVISIONS ON LOYALTY CONTRACTS

A conference agreement provision which prohibits any party to the agreement from entering into a loyalty contract has not been shown to be unlawful under the Shipping Act of 1984.

A conference agreement provision which prohibits any party to the agreement from taking independent action for the purpose of entering into a loyalty contract has not been shown to be unlawful under the Shipping Act of 1984.

R. Frederic Fisher for the Transpacific Westbound Rate Agreement.

Howard A. Levy for the Gulf-European Freight Association; the North Europe-U.S. Gulf Freight Association; the U.S. Atlantic-North Europe Conference; and the North Europe-U.S. Atlantic Conference.

F. Conger Fawcett and David C. Nolan for the North Europe-U.S. Pacific Freight Conference and the Pacific Coast/Australia-New Zealand Tariff Bureau.

Charles F. Warren, George A. Quadrino and Benjamin K. Trogdon for the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic & Gulf Freight Conference.

Stanley O. Sher, Marc J. Fink and Anne E. Mickey for the Asia North America Eastbound Rate Agreement; the South Europe/U.S.A. Freight Conference; the Greece/United States Atlantic and Gulf Conference; and the United States/South and East African Agreement.

Charles F. Rule, Michael Boudin, James R. Weiss and Craig W. Conrath for the U.S. Department of Justice.

Martin F. Fitzpatrick, Jr., for the U.S. Department of Agriculture.

David F. Zoll, E. Thomas Smerdon, Jr., John L. Oberdorfer, Michael D. Esch and Daniel M. Flores for the Chemical Manufacturers Association.

William A. McCurdy, Jr., and Peter Friedmann for E.I. DuPont De Nemours and Company.

Peter Friedmann for the American Paper Institute, Inc.

Paul L. Crouch for Calcot, Ltd.

Leo R. Holyszko for Dow Chemical International Operations.

Gerald H. Ullman for the National Customs Brokers and Forwarders Association of America, Inc.

Seymour Glanzer, Peter J. King and William D. Weiswasser for the Bureau of Hearing Counsel.

REPORT AND ORDER

BY THE COMMISSION: (Elaine L. Chao, Chairman; James J. Carey, Vice Chairman; Thomas F. Moakley, Edward J. Philbin and Francis J. Ivancie, Commissioners)

PROCEEDING

The Federal Maritime Commission ("Commission" or "FMC") instituted the proceeding in Docket No. 87-26 by Order to

Show Cause served December 3, 1987 ("December Order"),[1] directing the Transpacific Westbound Rate Agreement ("TWRA") to show cause why provisions in its conference agreement which prohibit any party from entering into a loyalty contract and which prohibit any party from taking independent action for the purpose of entering into a loyalty contract are not violative of the Shipping Act of 1984, 46 U.S.C. app. §§ 1702-1720 ("Act" or "1984 Act"). The December Order alleged a violation of section 5(b)(8) of the Act, 46 U.S.C. app. § 1704(b)(8), on the basis that the provisions infringed upon the mandatory right of independent action for conference members. The December Order also alleged that the agreement provisions constituted an unlawful refusal to deal in violation of sections 10(c)(1), 5(b)(5), and 10(a)(3) of the Act, 46 U.S.C. app. §§ 1709(c)(1), 1704(b)(5), and 1709(a)(3).

The December Order named the Commission's Bureau of Hearing Counsel as a party to the proceeding, and also named the following persons, that had opposed the TWRA provisions, as Protestants: the U.S. Department of Justice ("DOJ"); the Chemical Manufacturers Association ("CMA"); E. I. DuPont De Nemours and Company ("DuPont"); Dow Chemical International Operations ("Dow"); and the National Customs Brokers and

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[1] The December Order was published in the Federal Register on December 8, 1987 (52 Fed. Reg. 46,530).

Forwarders Association of America, Inc. ("NCBFAA").[2] The December Order also provided for participation by interested parties seeking to intervene.

On January 7, 1988, the Commission served an Order to Show Cause ("January Order") instituting Docket No. 88-1, Agreement Provisions On Loyalty Contracts. The named conference respondents were: the Gulf-European Freight Association Agreement ("GEFA"), the North Europe-U.S. Gulf Freight Association Agreement ("NEGFA"), the U.S. Atlantic-North Europe Conference Agreement ("ANEC") and the North Europe U.S. Atlantic Conference Agreement ("NEAC") (collectively, the "North Europe Conferences" or "NEC"); and the North Europe-U.S. Pacific Freight Conference Agreement ("NEUSPFC"). The agreements of these conferences also contained provisions prohibiting members from individually entering into loyalty contracts with shippers whether by independent action or otherwise. The January Order directed these conferences to show cause why their provisions did not violate sections 5(b)(8), 5(b)(5), 10(c)(1), and 10(a)(3) of the Act. Because of the common issues, the January Order consolidated Docket No. 88-1 and Docket No. 87-26.[3]

Subsequently, petitions for leave to intervene in support of the respondent conferences were received from the

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[2] DOJ, CMA, DuPont, Dow and NCBFAA had all submitted comments opposing the TWRA provisions when they were originally filed.

[3] Notice of this action was published in the Federal Register on January 13, 1988 (53 Fed. Reg. 803).

Pacific Coast/Australia-New Zealand Tariff Bureau ("PCANZ");[4] the Asia North America Eastbound Rate Agreement ("ANERA"), the South Europe/U.S.A. Freight Conference ("SEUSA"), the Greece/United States Atlantic and Gulf Conference ("GUSA") and the United States/South and East African Agreement ("USSEA") (collectively, "ANERA et al."); and the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference ("Japan Conferences"). In addition, amicus curiae comments on the January Order were filed by the U.S. Department of Agriculture ("USDA") and Calcot Ltd. ("Calcot"). A formal petition to intervene in opposition to the conferences was filed by the American Paper Institute, Inc. ("API").

On April 22, 1988, the Commission served an "Order Granting Petitions For Leave to Intervene" which granted all petitions for leave to intervene and accepted the filed amicus curiae comments.

In accordance with the briefing schedule which had been revised to accommodate additional parties, memoranda and rebuttal memoranda were filed by the respondent conferences

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[4] PCANZ joined in the memorandum filed by NEUSPFC. Australia-New Zealand Container Line, a participant (through the Australia-New Zealand Direct Line joint service) in PCANZ did not subscribe to the views expressed in the NEUSPFC memorandum and disassociated itself from the PCANZ intervention petition and the memorandum.

and intervenors supporting the conferences,[5] and reply memoranda and comments in opposition were filed by opponents of the conferences' position.[6]

The Commission also received requests for oral argument and for acceptance of certain material into the record. Replies to these requests were also filed. On June 20, 1988, the Commission served an order granting the request for oral argument.[7] Argument was held on August 4, 1988.

BACKGROUND

A. Agreement Provisions

1. Agreement No. 202-010689-017

Two provisions in the TWRA agreement are in issue in these consolidated proceedings. Article 5(e) of the basic authority article of the agreement states:

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[5] The following is a list of the opening memoranda and rebuttal memoranda filed by the conferences: (1) TWRA Memorandum and Verified Statement of Ronald B. Gottshall; (2) NEC Memorandum; (3) NEUSPFC Memorandum; (4) ANERA Memorandum; (5) Japan Conferences Memorandum and Affidavit of R.D. Grey; (6) TWRA Rebuttal Memorandum; (7) NEC Rebuttal Memorandum; (8) NEUSPFC Rebuttal Memorandum; (9) ANERA Rebuttal Memorandum; and (10) Japan Conferences Rebuttal Memorandum.

[6] The following is a list of reply memoranda and opposing comments: (1) Hearing Counsel Reply Memorandum; (2) DOJ Reply Memorandum; (3) CMA Reply Memorandum; (4) DuPont Reply Memorandum; (5) API Reply Memorandum; (6) USDA Comment; and (7) Calcot Comment.

[7] The request to receive material into the record was also granted and other parties were given an opportunity to address the subject matter of the documents accepted into the record.

> (e) Loyalty Contracts. No party may enter into a loyalty contract.

This provision thus prohibits the use of loyalty contracts on an individual basis by any member.

The second TWRA provision in issue, which appears in Article 13(h)(ii) of the independent action article of the agreement, states that no party may by independent action, establish or change:

> (ii) any loyalty contract, or amendment thereto (except to eliminate such a contract).

As TWRA explains in its Response, one aspect of this provision ". . . concerned a situation which did not occur -- adoption of loyalty contracts by members prior to the effective date of the amendment." TWRA Memorandum at 3. As currently effective, this provision prohibits the exercise of independent action for the purpose of offering a loyalty contract to a shipper.

2. Agreements Nos. 202-010270-024, 202-010656-024, 202-010636-028 and 202-010637-025

The NEC agreements provisions in issue in these proceedings,[8] stated in Article 5, are all substantially the

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[8] Subsequent to the January Order, the four North Europe Conferences withdrew the agreements made subject to the Order to Show Cause in Docket No. 88-1 and concurrently refiled new agreement amendments which: (1) restated verbatim the text of the withdrawn agreements as to loyalty contracts; and (2) suspended the parties' implementation of the stated authority until a future date. By "Notice and Supplemental Order" served on February 12, 1988, and published in the Federal Register on February 18, 1988 (53 Fed. Reg. 4,893), the Commission ordered these substitute amendments made subject to these proceedings. Subsequently, due to changes in the procedural schedule, further amendments were filed which further postponed implementation of the disputed authority.

same, and authorize the respective conferences or associations to:

> Use loyalty contracts (as defined at Section 3(14) of the Shipping Act of 1984) in conformity with the antitrust laws of the United States and, in connection therewith, agree to negotiate and enter into such contracts between the Conference and shippers, and revise the terms and terminate such contracts. Except as so agreed, no Member may negotiate, enter into or use a loyalty contract, whether by independent action or otherwise, or by such means, deviate in any respect whatsoever from the terms and conditions of any loyalty contract entered into pursuant to agreement of the members as herein provided.

This provision differs from the TWRA provision in that it purports to authorize conference loyalty contracts. Like the TWRA provision, however, it prohibits individual members from entering a loyalty contract by independent action or otherwise.

3. Agreement No. 202-000093-030

The NEUSPFC agreement provision in issue, which appears in Article 11(D), states:

> No Member Line may independently establish or use, in the Trade herein concerned, any loyalty contract as that term is defined in Section 3(4) [sic] of the U.S. Shipping Act of 1984, whether through purported independent action or otherwise.

Like the other agreements, this provision precludes any individual use of loyalty contracts by a conference member.

POSITIONS OF THE PARTIES

The following is a summary of the positions taken by the parties and participants in these consolidated proceedings. Those who support the provisions in the

conference agreements are designated "Proponents." Those who oppose the agreement provisions (which includes Hearing Counsel, shipper interests and executive branch departments) are designated "Opponents."

A. Independent Action on Loyalty Contracts

The principal issue in contention in these consolidated proceedings is whether a conference agreement may prohibit conference members from offering individual loyalty contracts and may prohibit members from exercising their right of independent action to offer an individual loyalty contract.

1. Conference Authority to Prohibit the Use of Loyalty Contracts

Proponents

Proponents argue that it is lawful for a conference to exercise its collective authority and to prohibit the use of loyalty contracts. TWRA, for example, argues that it is necessary to distinguish between fundamental matters belonging in an agreement and routine implementation in a tariff. It is TWRA's contention that the conference decision to adopt or prohibit loyalty contracts is not in itself something to which independent action applies.

In a similar vein, NEC argues that section 4(a)(6) of the 1984 Act, 46 U.S.C. app. § 1703(a)(6), allows members to agree to preclude independent action with respect to loyalty contracts. NEC's contention is that such an agreement is within the scope of section 4(a) and is not in conflict with or prohibited by any provision of the Act. In essence, this

argument contends that the decision to prohibit loyalty contracts is an agreement matter and not a tariff matter to which the right of independent action would apply.

A number of conferences find further support for the position that control over the use of loyalty contracts is an agreement matter in Isbrandtsen Co., Inc. v. United States, 211 F.2d 51 (D.C. Cir. 1953), cert. denied, 347 U.S. 990 (1954) ("Isbrandtsen"). Isbrandtsen is said to stand for the proposition that a decision to adopt or prohibit the use of loyalty contracts is a matter that must be explicitly resolved in the conference agreement itself and is not a matter of "interstitial" implementation of general authority which could be accomplished by a mere tariff change. It is argued that section 5(b)(8) does not allow for independent action from matters required by law to be set forth in the conference agreement. It is contended that the 1984 Act continues the Isbrandtsen distinction between tariff and agreement matters and that independent action simply does not apply to the latter.

Finally, NEUSPFC and TWRA argue that the conference provisions do not violate section 10(b)(9) of the Act, 46 U.S.C. app. § 1709(b)(9).

Opponents

CMA challenges the Proponents' argument that section 4 of the 1984 Act grants authority to conferences to prohibit the use of loyalty contracts. CMA states that the Proponents' view

> . . . is directly at odds with the section 10(b)(9) requirement that loyalty contracts be in conformity with the antitrust laws. The effect of section 4 is to remove the subjects covered by conference agreements from scrutiny under the antitrust laws, while section 10(b)(9) expressly subjects loyalty contracts to antitrust standards.

CMA Reply Memorandum at 8 (emphasis in original).

DuPont argues that the conference provisions fix the terms (including price) on which members can offer loyalty contracts. According to DuPont, these agreement provisions are a per se violation of the antitrust laws and are thereby prohibited by section 10(b)(9) of the Act. API argues that, by prohibiting all loyalty contracts by member lines, conferences are "using" loyalty contracts to fix prices in violation of the antitrust laws.

Hearing Counsel makes an extensive reply to the argument of the Proponents based on the Isbrandtsen decision. Hearing Counsel attacks the premise that the conference decision to adopt or prohibit the use of loyalty contracts is an agreement authority matter rather than a tariff matter. Hearing Counsel states that the factual and legal underpinnings of the Isbrandtsen decision, as it relates to loyalty contracts, were removed by the 1984 Act. This is because there is no public interest standard in the 1984 Act and because the Act makes loyalty contracts subject to the antitrust laws. The status of loyalty contracts is therefore that of the pre-Isbrandtsen regulatory stance under which dual-rate systems were treated as a matter of tariff implementation.

2. The Language of Section 5(b)(8

For reasons set forth below, Proponents argue that the plain language of the Act does not provide for the exercise of independent action for the purpose of offering a loyalty contract. Opponents disagree and argue that the plain language of section 5(b)(8) authorizes the exercise of independent action to offer a loyalty contract. Both sides carefully analyze the language of section 5(b)(8) and draw conflicting conclusions as to what that section means and what may be legitimately inferred from it. The focus of the debate is on the meaning of the term "rate or service item," the "in lieu of" clause, and the adopting independent action provision.

(a) The meaning of "rate or service item"

Proponents

Proponents, pointing out that the mandatory right of independent action applies only to a "rate or service item required to be filed in a tariff," argue that the 1984 Act does not state that a decision to adopt a loyalty contract, or the loyalty contract itself, is a "rate or service item." Proponents maintain that the fact that section 8(a)(1)(E) requires that a tariff include a sample copy of any loyalty contract does not mean that a loyalty contract is itself a rate or service item. They note that while section 8(a)(1)(E) also requires tariffs to include sample copies of bills of lading, contracts of affreightment, or other documents evidencing the transportation agreement, these

other transportation documents are not thereby made "rate or service items" merely because they must be included in a tariff. Proponents also point out that the Commission has already determined under the 1984 Act that not everything which may be required to be filed in a tariff is thereby subject to a mandatory right of independent action.[9]

Proponents argue further that the term "item" in the phrase "rate or service item" has a clearly understood meaning. In the context of tariff filings, it is said to refer to a numbered paragraph covering a tariff rate or rule. Proponents contend that an independent action must replace an existing conference tariff item. ANERA points out that the shipper commitment element of a loyalty contract is not a "rate or service item."

Opponents

Opponents argue that a loyalty contract is a "rate or service item" within the meaning of section 5(b)(8). CMA asserts that ". . . the essence of a loyalty contract lies in the rate and service terms incorporated in the loyalty contract." CMA Reply Memorandum at 3. These rate and service terms are said to be required to be filed in tariffs under section 8(a)(1). Therefore, they allegedly must be subject to independent action as well. CMA adds that

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[9] The case referred to is the Commission's decision determining that independent action is not required on freight forwarder compensation. In the Matter of the Independent Action Provisions of the Atlantic and Gulf/West Coast of South America Conference Agreement, 23 S.R.R. 390 (1985).

section 8(a)(1) requires that all "rates" must be filed and that nothing in the Act distinguishes "loyalty contract rates." CMA therefore claims that sections 5(b)(8) and 8(a)(1) are in themselves sufficient to establish a right of independent action with respect to loyalty contracts. According to CMA, it is not necessary for the Commission to determine whether the "sample loyalty contract" referred to in section 8(a)(1)(E) is a "rate or service item." CMA believes that the discussion of the sample copy of a loyalty contract has obscured the basic issue.

API, DuPont, USDA and DOJ all contend that loyalty contracts are made up of rate or service items that are required to be filed in a tariff and that the reference to a sample loyalty contract in 8(a)(1)(E) supports the argument that a loyalty contract is a tariff item to which independent action applies.

(b) The "in lieu of" clause

Proponents

Proponents' contention that independent action must replace an existing tariff item is said to be supported by the language in section 5(b)(8) which states that the independent action shall be "in lieu of the existing conference tariff provision for that rate or service item." It is argued that exercise of independent action to offer a loyalty contract is not consistent with this language. Proponents submit that such action is not "in lieu of" an existing conference tariff provision, but rather is an

entirely different system of contract carriage offered as an alternative to the conference tariff. Section 5(b)(8) allegedly only contemplates independent action that replaces an existing conference tariff item.

Opponents

CMA disputes the Proponents' argument that the "in lieu of" clause means that independent action can only be taken when it replaces an existing conference tariff item. CMA asserts that this interpretation is incorrect because it would mean that a conference could control or restrict independent action merely by cancelling a particular item in a tariff. CMA interprets the "in lieu of" language in the loyalty contract's context to mean ". . . that an independent loyalty contract rate applies in lieu of the existing and otherwise applicable ordinary tariff rate and service items." CMA Reply Memorandum at 23.

DuPont also contends that the conferences' interpretation would mean that conferences ". . . could prevent any significant independent action by merely failing or refusing to adopt a particular rate or type of rate or service item, or by prohibiting the making of any such rate or service by the conference as a whole." DuPont Reply Memorandum at 23.

API likewise argues that the conferences' interpretation of "in lieu of" is too narrow and would limit independent action. API states that the "in lieu of" clause merely means that any existing conference rate or service

item will not apply to a member line that takes independent action. As examples, API notes that under Proponents' theory a member could not offer its own intermodal rates by independent action where the conference had intermodal authority but refused to establish intermodal rates, nor could a member line establish its own equalization rules to compete with conference members at a port which it does not directly serve if the conference had no rule permitting port equalization and absorption.

DuPont offers other examples, pointing out that ". . . a conference could ban freight-all-kinds rates, or per-container rates and prevent any member from taking independent action to establish such a rate." DuPont Reply Memorandum at 23.

CMA, DuPont and API all contend that such results could not have been intended by Congress.

(c) The adopting independent action provision

Proponents

Proponents argue that allowing the exercise of independent action to offer loyalty contracts is incompatible with the requirement of section 5(b)(8) that other conference members may "adopt" an independent action for their "use." They point out that if the original independent action loyalty contract were for 100 percent of a shipper's cargo, then other conference members would be precluded from taking any adopting action. Similarly, any percentage greater than 50 percent would allegedly preclude,

at least in part, other conference members from taking matching action. Proponents state that even if the original independent action loyalty contract were only for 33 percent, the rights of other conference members would still be limited.

NEC argues, for example, that it is simply not possible to exercise statutory adopting rights in the context of loyalty contracts. NEUSPFC points out that the adopting provisions are rendered unavailable in the context of loyalty contracts. Proponents state that it is not merely a matter of a certain shipper's cargo being precluded from competition. Rather, contrary to Opponents' assertions, the very opportunity to compete for cargo in any practical sense is said to be precluded by the nature of loyalty contracts.

Moreover, it is argued that an antitrust dilemma is created for conference members who may take adopting action in light of the fact that DOJ, in its Business Review Letters, has only accepted a loyalty contract involving a single carrier as being consistent with the antitrust laws. Proponents are concerned that there is a risk of antitrust liability as more individual members adopt a loyalty contract or if the conference were to adopt a loyalty contract. The practical impact of this threat of antitrust exposure allegedly renders the adopting mechanism of section 5(b)(8) inoperable in the context of loyalty contracts. Proponents also point out that, unlike independent action on rate or service items, the conference itself may not adopt

the independent action loyalty contract of a member line because of DOJ's opposition to conference loyalty contracts.

Finally, TWRA points out that independent action cannot work in the case of one carrier adopting the terms of an actual loyalty contract with a shipper. Using an independent carrier contract attached to its opening memorandum as an example, TWRA states that what would be adopted are the actual contract terms, including: (1) contract provisions that commit 50 percent of the shipper's cargo to that particular carrier; (2) a requirement that all cargo move under the carrier's bill of lading or not qualify for contract rates; (3) a prohibition against assignment of the contract to anyone other than that particular carrier; and (4) a requirement that notices be served on the carrier at its offices.

Opponents

DOJ, CMA, DuPont and API all contend that allowing independent action loyalty contracts does not vitiate the adopting clause in section 5(b)(8). CMA states that any other conference member could readily adopt loyalty contract action by adopting the rate or service items and competing for all shippers' cargo or competing for the remaining business of the loyalty contract shipper. CMA argues further that the right of adopting another member's independent action when taken on ordinary tariff rates does not necessarily result in a second carrier sharing carriage of the cargo offered to the first.

DuPont states that the statute provides the opportunity to adopt a rate but does not guarantee cargo. DuPont states that if the loyalty contract is for 50 percent or less of a shipper's cargo, then another carrier could adopt the contract for that or another shipper.

API states that the conferences' interpretation of the "for use of" language is based on the false premise that if another carrier cannot "use" the rate, then no independent action is permitted.

DOJ also contends that the conferences' interpretation of the adopting clause is based on the erroneous assumption that a loyalty contract will be for 100 percent of cargo when it could actually be for 50 percent or 33 percent. DOJ claims that other members could adopt it and offer it to other shippers. Finally, DOJ takes the position that adopting loyalty contracts of other conference members would not necessarily be a violation of section 10(b)(9) of the Act. DOJ explains:

> The antitrust laws prohibit collusive, not merely parallel, pricing actions and both the Department and the Commission are fully able to distinguish between them. The Department must determine in most Sherman Act investigations whether the activities of concern were unilateral or the product of agreements. The Commission, too, can be called upon to determine whether an unreasonable refusal to deal is concerted and thus prohibited by section 10(c)(1) or unilateral and thus lawful . . . .

DOJ Reply Memorandum at 11.

3. The Legislative History of Section 5(b)(8)

Proponents

NEC contends that the legislative history of section 5(b)(8) and interrelated provisions of the 1984 Act shows that Congress intended to exclude loyalty contracts from the reach of independent action. ANERA also contends that the legislative history of the 1984 Act supports conference prohibition of individual member loyalty contracts.

ANERA's exploration of the legislative history focuses primarily on the requirement that a sample copy of a loyalty contract be included in a tariff. ANERA asserts that the legislative history shows that the requirement to file a sample contract did not transform a loyalty contract into a rate or service item. According to ANERA, the filing requirement was a ". . . recognition that since the loyalty contract itself no longer had to be filed with the FMC for notice, hearing and approval, a sample copy should be included in the tariff since the contract had to be available 'to all shippers on equal terms and conditions.'" ANERA Memorandum at 11.

NEC's discussion of the legislative history of the independent action provision is directed toward demonstrating that Congress intended that the mandatory right of independent action apply only with regard to conference rates and other supplemental tariff matter and was never intended to apply to loyalty contracts. TWRA argues that the Conference Committee Report's silence with regard to independent action on loyalty contracts does not suggest that independent action does apply.

Opponents

Hearing Counsel, CMA, API and DOJ review the legislative history of the 1984 Act and find that it supports a right of independent action on loyalty contracts. They question the authority of the early legislative history, especially in light of the dramatic changes in the treatment of loyalty contracts late in the legislative process. CMA takes the position that the legislative history cited and relied upon by ANERA and NEC is not applicable because it is drawn from an earlier formulation of the independent action requirement, when a conference loyalty contract was a precondition for independent action and before conference loyalty contracts were in effect prohibited by requiring their conformity with the antitrust laws.

4. The Overall Purpose of the 1984 Act

Proponents

All of the conferences make the argument that allowing the exercise of independent action to offer a loyalty contract would be contrary to the overall purpose of the 1984 Act. Such an interpretation allegedly would be in conflict with the basic legislative compromise achieved by the Congress. According to TWRA, "[f]inespun parsing of statutory language should not operate to the detriment of a common sense approach based on a consistent congressional purpose." TWRA Memorandum at 60. TWRA focuses particularly on the legislative bargain struck in introducing service

contracts into the regulatory scheme. It states that the consequences of this new system of contract carriage were "enormous and potentially devastating." Id. at 61. TWRA's position is that: "The trade-off for consent to this development was that conferences could ban such [service] contracts and ban independent action either to adopt such contracts or to vary rates and service items in any conference service contracts." Id. TWRA states that this statutory scheme would be subverted if a member could in effect use a service contract merely by stating it in terms of a percentage and thereby converting it to a loyalty contract.

NEUSPFC also makes a statutory purpose argument. As seen by NEUSPFC, that purpose was to provide for a strong, viable functioning steamship conference system. It states that independent action was intended to serve as a safety valve against oppressive use of conference power. It was not intended, according to NEUSPFC, that the safety valve swallow up the system. NEUSPFC traces the legislative history of the loyalty contract provisions and the emergence of service contracts subject to specific statutory requirements and characterizes the loyalty contract provision in the 1984 Act as "vestigial." NEUSPFC Memorandum at 20.

NEUSPFC contends that the attempt to discern the intent of Congress through the legislative history is "an exercise in futility" and concludes that Congress' ultimate treatment

of loyalty contracts must be considered uncertain in purpose or meaning. NEUSPFC Rebuttal Memorandum at 6. Nor does the answer lie in a "line by line exegesis" of the language of the 1984 Act, according to NEUSPFC; rather, it is necessary to look at the broad legislative objectives of the Act. Id. at 7. NEUSPFC states that Congress did not focus on this issue; it is therefore the Commission's task to interpret what Congress would have intended had it faced this issue. NEUSPFC concludes that to allow members to use independent action to offer "loyalty contracts" would mean that Congress meant to introduce a "Trojan horse" into the scheme of the 1984 Act. NEUSPFC Memorandum at 20.

The Japan Conferences also argue that a contrary interpretation would collide with Congress' basic purpose to preserve the conference system. This is because the sanctioning of the application of independent action for the use of loyalty contracts ". . . would have the direct and immediate effect of rendering obsolete that statute's service contracts provisions . . . ." Japan Conferences Memorandum at 5.

Opponents

API rejects Proponents' argument that independent action should not be permitted on loyalty contracts because to do so would destroy conferences and thereby undermine one of the chief purposes of the 1984 Act, namely to preserve and in fact strengthen the conference system. Such assertions are said to be mere speculation. API states that

although it was also feared that conferences would be destroyed by independent action, conferences today are larger and attract more independents than pre-1984 Act conferences. According to API, the shipping public should not be deprived of the use of loyalty contracts on the basis of mere speculation.

Hearing Counsel also argues that the conferences' provisions completely negate the use of loyalty contracts which are expressly provided for in the Act. USDA states in a similar vein that prohibition of loyalty contracts would adversely impact U.S. agricultural exports.

5. Commission Actions Under the 1984 Act

Proponents

NEC argues that Commission actions under the 1984 Act demonstrate that a loyalty contract is not a "rate or service item" within the meaning of section 5(b)(8). NEC examines the Commission's proceedings and final rules implementing the 1984 Act with respect to tariffs, loyalty contracts and agreements and concludes that nowhere has a "loyalty contract" been associated with rate or service items required to be filed in tariffs.

NEC looks also at the Commission's independent action rulemakings and proceedings and concludes that there is nothing in any of these proceedings that ". . . reveals any intent to construe the mandatory IA provisions of section 5(b)(8) to be applicable to loyalty contracts or discloses that any such concept ever occurred to the Commission." NEC Memorandum at 116.

Opponents

CMA, DuPont, and Hearing Counsel review the Commission actions and decisions under the 1984 Act cited by Proponents and contend that they support independent action on loyalty contracts. In particular, DuPont notes that the Commission's freight forwarder decision defined a rate as the price of service and says that this supports independent action on loyalty contracts.

6. Pre-1984 Act Cases and Legislative Enactments

Proponents

NEC argues that pre-1984 Act cases and legislative enactments also support the argument that loyalty contracts should not be considered rate or service items. NEC refers to the language and legislative history of the 1961 dual rate contract amendments to the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. app. § 813a (repealed), and submits that the statutory requirements for such dual rate contracts show ". . . that they are not themselves rate or service items but peculiar conditions of a tying agreement and in respect to which rate and service items stated in the general carrier tariff, not in the loyalty contract apply." NEC Memorandum at 91. NEC asserts that the Congress that enacted the 1984 Act understood that loyalty contracts and their terms and conditions were not rate or service items but an entirely distinct substantive matter. NEC states that the Commission was also aware of this distinction as shown in its decision in The Dual Rate Cases, 8 F.M.C. 16

(1964). NEC claims further that the Commission's rules promulgating a "uniform Merchant's Contract Form" (repealed in 1984 after enactment of 1984 Act) also recognized this distinction. NEC concludes that:

> . . . the Congress that enacted the 1984 Act shared the perception of all Congresses since the enactment of the 1916 Act, including that of the Congress that enacted the 1961 dual rate/loyalty contract law, and the perception of this Commission and its predecessors over the last 72 years, that loyalty contracts on the one hand, and rate and service items on the other, were not one and the same thing but two things of an entirely different economic and legal character.

NEC Memorandum at 94.

Opponents

Hearing Counsel reviews pre-1984 Act loyalty contract precedent, particularly in its rebuttal to the conferences' Isbrandtsen argument. Hearing Counsel considers cases, legislative enactments and rulemakings for the purpose of demonstrating that loyalty contracts have always been recognized as common carriage under the Shipping Acts.

B. Refusal to Deal

The second issue addressed in these consolidated proceedings is whether a conference prohibition on the use of loyalty contracts constitutes an unreasonable refusal to deal.

Proponents

Proponents contend that the refusal to deal issue is dependent upon the first issue and that if a conference may lawfully prohibit individual loyalty contracts or the use of independent action to offer a loyalty contract, then there

is no separate issue of a refusal to deal. Thus, it is argued that the refusal to deal issue associated with the December and January Orders' citation of sections 5(b)(5), 10(a)(3) and 10(c)(1) is not an issue that will stand on its own but rather is contingent upon a finding of a violation of the independent action provision.

TWRA submits that the prohibition of loyalty contracts is not an "unreasonable refusal to deal" prohibited by section 10(c)(1). It contends that: (1) denial of a loyalty contract is no different than denial of a service contract which is not an unreasonable refusal to deal; (2) determination of unreasonableness is a factual one and there is not even an allegation that any TWRA carrier has refused to sell shipping services to anyone; and (3) a refusal to grant a particular type of contract is not a refusal to deal.

NEC argues that if the conference provisions are lawful under section 5(b)(8), then they cannot be found to be unlawful under section 10(c)(1). The section 5(b)(8) issue is said to be the only real issue in this proceeding. NEC expressly adopts the arguments advanced by TWRA on this issue.

The Japan Conferences also argue that the conference agreement provisions at issue do not violate the section 10 prohibitions relating to an unreasonable refusal to deal. They take the position that: (1) there must be discrimination in order to have a violation of section

10(c)(1) and none is present here; (2) conferences are not required to offer every possible service or to yield to every demand of their customers; (3) a conference ban on service contracts does not violate section 10(c)(1) and loyalty contracts should be treated no differently; and (4) even an application of antitrust principles and analysis would not lead to a finding of a violation of section 10(c)(1). Finally, the Japan Conferences view as significant that DOJ does not make a section 10(c)(1) violation argument.

ANERA argues that there can be no violation of section 10(c)(1) because the conference provisions in question do not discriminate among shippers or segments of shippers.

NEUSPFC argues that the alleged violations of sections 5(b)(5), 10(a)(3) and 10(c)(1) all flow from the alleged violation of section 5(b)(8). It responds only to the section 5(b)(8) issue and does not separately address the alleged violations of sections 5(b)(5), 10(a)(3) and 10(c)(1).

Opponents

CMA, API and DuPont argue that the conference provisions in question are unlawful refusals to deal and violate section 10(c)(1). CMA states that the Act contemplates the use of loyalty contracts by individual carriers within the framework of independent action. It maintains that the conference provisions foreclose all shippers from utilizing a significant carriage mechanism

(i.e., loyalty contract) and that this removal constitutes an unreasonable refusal to deal in violation of section 10(c)(1). API states that: "An agreement by conference competitors to refuse to offer any form of loyalty contract rates is a boycott or unreasonable refusal to deal because it denies shippers any opportunity to make loyalty contracts with a conference member." API Reply Memorandum at 15. It concedes that no carrier has an obligation to make a loyalty contract, but argues that carriers do not have the collective right under the 1984 Act to refuse to make them.

DuPont takes the position that the conference provisions amount to a horizontal refusal to deal whose purpose is to fix prices, a per se violation of the antitrust laws. It cites extensively from antitrust cases dealing with boycotts and refusals to deal. DuPont also contends that the conference provisions may be found to violate section 10(c)(1) separate and apart from any violation of section 5(b)(8). It submits that an agreement among carriers to refuse to offer any loyalty contract rates "fits within the kinds of refusals to deal prohibited by section 10(c)(1)." DuPont Reply Memorandum at 28. Thus, DuPont rejects the conference argument that there is really no separate issue under section 10(c)(1) if it is determined that independent action is not required under section 5(b)(8).

Hearing Counsel urges that the prohibition on loyalty contracts is an unreasonable refusal to deal in violation of

section 10(c)(1). According to Hearing Counsel, this violation in turn triggers a series of violations of other sections of the Act:

> Further, the violation of section 10(c)(1) also triggers a violation of section 5(b)(5) which requires the conference to affirmatively prohibit any conduct on the part of the conference which is barred by sections 10(c)(1) or 10(c)(3). The violations of section 5(b)(5) and section 5(b)(8), in turn, trigger violations of section 10(a)(3), in that the conferences have operated under an agreement required to be filed under section 5 "except in accordance with the terms of the agreement."

Hearing Counsel Reply Memorandum at 52 (emphasis in original). Hearing Counsel suggests that the Commission may wish ". . . to hold in abeyance the issue of sanctions with respect to these latter violations pending a conference determination to cease and desist all conduct in violation of section 5(b)(8) with respect to loyalty contracts." Id. at 52-53.

DISCUSSION

The conference agreement provisions at issue in these consolidated proceedings raise a significant question concerning the status and treatment of loyalty contracts under the Shipping Act of 1984 and the relationship of loyalty contracts to other key provisions in the Act, namely independent action and service contracts. Both sides have advanced credible arguments in support of their respective positions in their pleadings and at oral argument. The record here represents a thorough exploration of this question.

Having reviewed this record, we conclude based on the language of the statute, its extensive legislative history, and the overall purposes and objectives of the 1984 Act that the use of a loyalty contract is not the type of subject matter that was intended to be covered by the mandatory right of independent action. A conference agreement therefore is not required to provide for a right of independent action with respect to loyalty contracts and may prohibit the use of loyalty contracts by individual members. This conclusion is consistent with the intent of Congress and preserves the balance of carrier and shipper interests in the legislative scheme and the accommodation of those interests worked out by the Congress in the Shipping Act of 1984.

A. Conference Authority to Prohibit the Use of Loyalty Contracts

A preliminary issue, not raised in the Commission's Orders to Show Cause but asserted by several Opponents, is whether a conference may lawfully prohibit its members from entering into a loyalty contract. This question comes down to whether a conference has the authority to impose such a ban aside and apart from any consideration of the lawfulness of such a restriction under section 5(b)(8).

As an initial matter it would appear that such a collective action on the part of a conference is within the scope of conference agreement authority under section 4 of the Act. Section 4(a)(5) authorizes carriers to engage in cooperative working arrangements among themselves. Section

4(a)(6) deals with broad authority to control, regulate, or prevent competition. Either section would appear to provide a basis for members of a conference to agree to prohibit the use of loyalty contracts.

CMA, DuPont and API, however, have argued that such a prohibition on the use of loyalty contracts conflicts with section 10(b)(9) of the Act, 46 U.S.C. app. § 1709(b)(9), which provides that no conference may:

> (9) use a loyalty contract, except in conformity with the antitrust laws. . . .

Section 10(b)(9), however, does not absolutely prohibit the "use" of a loyalty contract by a conference. Rather, it makes such "use" subject to antitrust requirements. A conference which lacked sufficient market power in a particular trade could, as a theoretical matter, offer a conference loyalty contract. The Department of Justice has acknowledged this possibility.

CMA states that: "The effect of section 4 is to remove the subjects covered by conference agreements from scrutiny under the antitrust laws, while section 10(b)(9) expressly subjects loyalty contracts to antitrust standards." CMA Reply Memorandum at 8. In essence, CMA claims that conferences simply cannot act on loyalty contracts because loyalty contracts are subject to antitrust standards. This argument, however, appears to misinterpret section 10(b)(9). As noted above, section 10(b)(9) makes <u>use</u> of loyalty contracts subject to the antitrust laws; it does not remove loyalty contracts from the realm of conference agreement.

DuPont and API take a slightly different approach. Their position is that a prohibition on the use of loyalty contracts amounts to a form of price fixing, a per se violation of the antitrust laws, and therefore a violation of section 10(b)(9). The contention is that denying individual loyalty contracts is in effect fixing the terms on which members can offer loyalty contracts.

This argument is more ingenious than meritorious. We cannot accept the theory that a prohibition on use by members is in itself a form of "use" which violates section 10(b)(9). In so doing, we also note DOJ's silence on the question of whether such a prohibition would on its face violate the antitrust laws.

We therefore find that as a matter of conference authority to act, and putting aside for the moment the question of lawfulness under section 5(b)(8), the 1984 Act does not ban a conference prohibition on individual member loyalty contracts. Such a restriction does not, therefore, on its face, amount to a prohibited act under section 10(b)(9). Thus, section 10(b)(9) does not raise a barrier to a conference agreement which simply states that "no party may enter into a loyalty contract."

B. The Distinction Between Loyalty Contracts and Service Contracts under the 1984 Act

A second preliminary matter to be considered, before addressing the section 5(b)(8) issue, is the distinction between loyalty contracts and service contracts under the 1984 Act. Some Proponents have argued that a loyalty

contract is simply a particular type of service contract and should not be treated differently from service contracts under the Act.

The difficulty with this argument, however, is that the language of the statute defines and distinguishes between loyalty contracts and service contracts. Section 3(14), 46 U.S.C. app. § 1702(14), defines "loyalty contract" as:

> . . . a contract with an ocean common carrier or conference, other than a service contract or contract based upon time-volume rates, by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference.

Section 3(21), id. § 1702(21), defines "service contract" as:

> . . . a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level--such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

Thus, the key statutory distinction between these two types of contract carriage is that a loyalty contract is stated in terms of a fixed percentage, whereas a service contract is stated in terms of a minimum quantity of cargo.

The Commission itself has on a number of occasions addressed and affirmed the distinction between these two types of contracts. See Application of the Loyalty Contract Provisions of the Shipping Act of 1984 to a Proposed Tariff Rule on Refunds, ___ F.M.C. ___, 23 S.R.R. 1098 (1986). See

also Service Contracts; Loyalty Contracts; and Publishing and Filing of Tariffs By Common Carriers in the Foreign Commerce of the United States, ___ F.M.C. ___, 22 S.R.R. 1424 (1984) ("Service Contracts; Loyalty Contracts").

In the latter proceeding, the Commission was asked in a filed comment to revise the definition of a "service contract" in its rules to allow service contracts to be stated in terms of a fixed percentage of a shipper's cargo. The Commission declined to adopt this suggestion because it:

> . . . would, in effect, convert a service contract to a "loyalty contract" as that term is defined by the Act . . . . It would be inconsistent with Congress' treatment of loyalty contracts elsewhere in the Act . . . and will not therefore be adopted.

22 S.R.R. at 1430. Thus, the Commission preserved the distinction between service contracts and loyalty contracts.[10]

The distinction between "service contracts" and "loyalty contracts" is not merely a matter of statutory definitions, however. Their treatment under other provisions of the 1984 Act is quite different. Conference authority over service contracts is expressly stated in section 4(a)(7) which authorizes conferences "to regulate or prohibit their use of service contracts," 46 U.S.C.

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[10] Most recently the Commission reiterated this distinction in its service contract rulemaking. See Service Contracts, ___ F.M.C. ___, 24 S.R.R. 277 (1987). In that rulemaking the Commission rejected the suggestion that the final rule should permit "fixed percentage" service contracts. Id. at 295-96.

app. § 1703(a)(7), and is fully covered by antitrust immunity. And because service contracts are not required by section 8(a) to be filed in a tariff, the mandatory right of independent action does not apply.

As noted above, conference authority with respect to loyalty contracts is subject to section 10(b)(9) which prohibits conferences to use a loyalty contract, except in conformity with the antitrust laws. Thus, while it is possible to imagine a situation where use of a loyalty contract by the conference might not violate the antitrust laws,[11] it would appear that section 10(b)(9), as a practical matter, would preclude the use of most, if not all, conference loyalty contracts.

Nevertheless, Proponents argue that the Commission should accord loyalty contracts the same treatment as

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[11] This possibility was suggested by DOJ itself. See Oral Argument Tr. 67-70, in which DOJ counsel indicated that a dual rate-type conference loyalty contract would probably not receive a favorable business review letter from DOJ. Counsel stated that ". . . a conference or an agreement among carriers that's a small portion of the trade might need to be treated differently." Id. at 68.

In its Reply Memorandum at 9, DOJ stated: "The Act -- in its final version -- contemplates individual loyalty contracts. Congress retained provisions that clearly anticipate that loyalty contracts will continue to exist; but Congress also effectively prohibited conference loyalty contracts. If Congress expected there to be loyalty contracts -- but not conference loyalty contracts -- then Congress must have had in mind individual loyalty contracts."

DOJ does not argue that a prohibition on loyalty contracts by a conference is itself an antitrust violation as some other Opponents have contended.

service contracts as regards conference authority and the right of independent action. They find a precedent for such an approach in the action that the Commission took in Service Contracts; Loyalty Contracts. There the Commission determined that a time/volume contract is a form of service contract and is therefore subject to both statutory and regulatory requirements for service contracts. The Commission stated that there is no meaningful difference between a service contract and a time/volume contract. The Commission elaborated on its rationale for this view as follows:

> Any contrary conclusion would be inconsistent with Congress' treatment of independent action and its relation to service contracts. Congress gave conferences the authority to limit or prohibit the use of service contracts and also exempted such contracts from the mandatory right of independent action, since they were not required to be filed in tariffs. All conference agreements, however, had to provide their members independent action on any rate or service item required to be filed in a tariff, on not more than 10 days' notice. If the Commission were to permit all common carriers to offer time/volume contracts in lieu of or in competition with service contracts, the situation could arise where carriers, through the use of time/volume contracts (to which independent action would apply) could do indirectly what Congress has not authorized them to do directly.

22 S.R.R. at 1441. Proponents argue that this same rationale should be applied in the context of loyalty contracts. To do otherwise allegedly would be inconsistent with Congress' treatment of service contracts.

The rationale of Service Contracts; Loyalty Contracts, however, is predicated on equating a time/volume contract with a service contract. There is greater leeway for such an interpretation of a time/volume contract because this

term is not defined in the statute or expressly distinguished from a service contract. The approach of Service Contracts; Loyalty Contracts does not necessarily lend itself to loyalty contracts which are separately defined and, more significantly, receive markedly different antitrust treatment under the Act.

This argument, however, surfaced again at oral argument when counsel for NEC focused special attention on a passage from a Senate Report which discussed a provision in a proposed bill which required that the essential terms of all service contracts include a statement of "service commitments." The cited passage from the Report stated:

> Paragraph (6) requires disclosure of the service commitments in a contract. This goes to the very essence of a service contract, embodying undertakings and obligations above and beyond those involved when business is transacted under the otherwise applicable general common carrier tariff. It should be emphasized that a loyalty contract or a time-volume rate arrangement, each separately authorized elsewhere in the bill, are not service contracts with the intended meaning of that term unless accompanied by a bona fide special service commitment by the contracting carrier or conference that deviates from its general tariff obligation.

S. Rep. No. 3, 98th Cong., 1st Sess. 32 (1983). Counsel for NEC suggests that this passage supports the proposition that a contract arrangement, including a loyalty contract, that has a "special service commitment" is thereby a service contract under the Act. This interpretation of the Report, however, appears to be much too broad and would in effect obliterate the distinction between "loyalty contract" and "service contract" under the Act. Moreover, unless it were

determined that loyalty contracts are virtually identical with service contracts (which would be contrary to their definition and treatment under the Act), the legal issue would still remain. It would be necessary to determine whether a loyalty contract is a "rate or service item" within the meaning of section 5(b)(8).

C. Conference Authority to Prohibit the Exercise of Independent Action for the Purpose of Entering a Loyalty Contract

All parties agree that the core question in these consolidated proceedings is whether a conference prohibition on the use of loyalty contracts by individual members through the exercise of independent action violates section 5(b)(8) of the Act by infringing upon the right of independent action. A review of the language, legislative history and Congressional purpose of the 1984 Act leads to the conclusion that the mandatory right of independent action does not apply to loyalty contracts.

1. The Language of the 1984 Act

The mandatory right of independent action, as set forth in section 5(b)(8), 46 U.S.C. app. § 1704(b)(8), requires conferences to:

> (8) provide that any member of the conference may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of this Act upon not more than 10 calendar days' notice to the conference and that the conference will include the new rate or service item in its tariff for use by that member, effective no later than 10 calendar days after receipt of the notice, and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date, in lieu of the existing

> conference tariff provision for that rate or service item.

As section 5(b)(8) indicates, independent action is mandatory only on "rate or service items" required to be filed in a tariff under section 8(a).[12] Although the term "rate or service item" is not itself defined in the Act,[13] it would appear that it is intended to refer to the ordinary items that are required to be filed in a tariff. The word "item" itself supports this interpretation. Item, as one conference has suggested, appears to refer to a numbered article or provision in a tariff.

This meaning is further supported by the Act's definition of the term "through rate" as:

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[12] Section 8(a)(1), 46 U.S.C. app. 1707(a)(1), requires that each common carrier and conference shall file tariffs showing:

> all its rates, charges, classifications, rules, and practices . . . .

[13] This term has been interpreted once by the Commission in the context of forwarder compensation. In a petition for a declaratory order, the Commission was asked to decide whether the mandatory right of independent action applied to forwarder compensation. The Commission determined that forwarder compensation was not a "rate or service item" because it did not involve the carrier-shipper relationship. It was held that a rate or service item must be a rate or service provided by a carrier to a shipper. See In the Matter of the Independent Action Provisions of the Atlantic and Gulf/West Coast of South America Conference Agreement, ___ F.M.C. ___, 23 S.R.R. 390 (1985). Inasmuch as a loyalty contract is an agreement between a carrier and a shipper and does include rate and service features provided by the carrier to the shipper, the Commission's freight forwarder decision is not dispositive of the question of whether a loyalty contract is a rate or service item.

> the single amount charged by a common carrier in connection with through transportation.

46 U.S.C. app. § 1702(25) (emphasis supplied). This comports with the general definition and understanding of the term "rate." Black's Law Dictionary, for example, defines a "rate" as follows: "In connection with public utilities, a charge to the public for a service open to all and upon the same terms." Black's Law Dictionary 1134 (5th ed. 1979). Thus the understanding of rate both in the context of shipping and in transportation and common carrier law more generally is that it is a particular charge levied for a particular service. Similarly, an item of "service" is a particular service provided by a carrier to a shipper. A "rate or service item" would thus appear to be the ordinary, discrete items which appear in a tariff.

A "loyalty contract," on the other hand, is defined by the 1984 Act in a manner which clearly distinguishes it from a "rate or service item." As indicated above, section 3(14) of the Act, 46 U.S.C. app. § 1702(14), states that a loyalty contract is:

> a contract with an ocean common carrier or conference, other than a service contract or contract based upon time-volume rates, by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference.

Again the term "contract" has a well understood meaning. One definition states that a contract is:

> An agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter, a legal consideration,

> mutuality of agreement, and mutuality of obligation.

Black's Law Dictionary 291-92 (5th ed. 1979). Thus, in a loyalty contract the carrier obligates itself to furnish a more favorable rate and a shipper commits itself to provide all or a fixed portion of its cargo. In both the general understanding of these terms and their context in the Shipping Act, there is a clear distinction between a "rate or service item," and a "loyalty contract." On the one hand, there is a single charge unilaterally levied by a common carrier. On the other, there is an agreement between two parties that involves mutual obligations. In addition, the concept of a "rate or service item," implies a charge for a particular shipment. A "loyalty contract," on the other hand, contemplates a continuing relationship between carrier and shipper.

As a matter of both legal definition and economic effect a loyalty contract is different from a "rate or service item." A loyalty contract may include rate or service items, but it is not itself "a rate or service item." Therefore, it does not appear that a loyalty contract is a "rate or service item" within the meaning of section 5(b)(8). Accordingly, the mandatory right of

independent action would not apply to loyalty contracts.[14]

Nevertheless, Opponents find support for the premise that a loyalty contract is a rate or service item in the requirement that a sample copy of a loyalty contract appear in a tariff. Section 8(a)(1)(E) requires that tariffs shall -

> (E) include sample copies of any loyalty contract, bill of lading, contract of affreightment, or other document evidencing the transportation agreement.

46 U.S.C. app. § 1707(a)(1)(E). As Proponents point out, however, the requirement of filing a sample copy of a loyalty contract does not in and of itself conclusively establish that a loyalty contract is a rate or service item. The Commission's decision in In the Matter of the Independent Action Provisions of the Atlantic and Gulf/West Coast of South America Conference Agreement, ___ F.M.C. ___, 23 S.R.R. 390 (1985), acknowledged that not everything which is required to be placed in a tariff is a rate or service item and subject to independent action. As enumerated in section 8(a)(1)(E) itself, other matter such as bills of lading are also required to appear in a tariff. Yet this

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[14] We also note that from an historical perspective loyalty contracts have been seen as quite distinct from ordinary tariffed items and have been accorded significantly different treatment both by the courts and by the Congress. See Isbrandtsen Co., Inc. v. United States, 211 F.2d 51 (D.C. Cir. 1953), cert. denied, 347 U.S. 990 (1954); the Dual Rate Amendments to the Shipping Act, 1916, Pub. L. No. 87-346, 75 Stat. 762, October 3, 1961. Similarly, this distinction is evident in the legislative history of the 1984 Act. See discussion, infra, at 46-65.

does not mean that bills of lading are subject to a right of independent action.

The premise that loyalty contracts are not intended to be included within the meaning of "rate or service item" is further bolstered by a consideration of the adopting independent action mechanism of section 5(b)(8). Section 5(b)(8) provides that if a member takes independent action, other members have an opportunity or right to "adopt" that action and make it their own. In the case of an ordinary tariffed rate or service item, the mechanism of adopting independent action operates in a reasonably straightforward manner. If a carrier member exercises independent action to offer a lower rate on a commodity, another carrier member may adopt that action on or after its effective date. Any number of other members may also adopt the original independent action for their own use. Although not specified in section 5(b)(8), the conference as a group may decide to adopt the action by making the independent action rate the conference rate. Under such circumstances other members may compete with the original independent action member for the cargo of other shippers. Except for the shipment that presumably motivated the original independent action, all other cargo is potentially available to every member of the conference and to the conference as a group.

Whenever this adopting mechanism is considered in the context of loyalty contracts, however, a number of anomalies arise. The first of these is that a loyalty contract by its

very nature is intended to lock up future shipments as a result of the cargo commitment by a shipper. Even if a particular loyalty contract is for less than 100 percent of a shipper's cargo, a certain percentage of future cargo has potentially been removed from the market. Moreover, even a loyalty contract for only 33 percent of a shipper's cargo could mean that only one or two other conference members would be able to effectively take an adopting action.

This is not to say that the mechanism of adopting independent action is meant to guarantee that other members will actually be able to obtain cargo or to maintain fully competitive parity with the original independent action. As a practical matter, however, the right of adopting independent action does not seem to be fully functional in the context of loyalty contracts.

A second difficulty is that there is some legal uncertainty created by a series of actions adopting loyalty contracts that is not created by a series of adopted rates. DOJ has indicated that a series of independently adopted loyalty contracts would not necessarily run afoul of the antitrust laws.[15] The fact remains, however, that conference members might be walking an antitrust tightrope. This concern could easily discourage the exercise of adopting independent action. Moreover, it is only as a theoretical matter that a conference could ever "adopt" a

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[15] See Oral Argument Tr. 80; DOJ Reply Memorandum at 11.

loyalty contract. There is thus a significantly different set of commercial and legal consequences when adopting independent action is considered in the context of loyalty contracts, than in the context of ordinary rates and services. This difference suggests that independent action was never intended to be applied to loyalty contracts.

In summary, an examination of statutory language supports two conclusions. First, as a definitional matter the Act differentiates between a "loyalty contract" and the term "rate or service item." A loyalty contract is defined by statute. It involves mutual commitments of both parties to the contract. A conference or carrier offers a rate lower than its regular published tariff rate and the shipper in turn obligates itself to commit all or a fixed portion of its cargo. A "rate or service item," on the other hand, while not defined by the Act, would appear to be the ordinary "items" stated in a tariff and not the extraordinary tying device of a loyalty contract.

Second, in examining the structure of section 5(b)(8), it appears that the right of adopting independent action does not function as well in the context of loyalty contracts as it does for ordinary tariff items applicable to individual shipments. This would indicate that it was never contemplated that independent action would apply to loyalty contracts, a device intended to foster a continuing relationship between a carrier and a shipper.

2. <u>The Legislative History of the 1984 Act</u>

The legislative history of the Shipping Act of 1984 spans three Congresses and includes extensive testimony and numerous bills and reports in the House and Senate. Examination of that history does not uncover any passage in a report, provision in a bill, or comment on the floor which directly addresses the matter at issue here; i.e., whether a conference must allow its members to exercise independent action to offer a loyalty contract. A close examination of that history, however, does support the conclusion that Congress did not consider loyalty contracts to be the kind of ordinary tariff matter which would be subject to mandatory independent action. Thus that legislative history supports a determination that a loyalty contract is not a "rate or service item" within the meaning of section 5(b)(8).

(a) The 96th Congress

(1) Senate Consideration

On July 9, 1979, Senator Inouye introduced S. 1460, a bill to amend the Shipping Act, 1916 (then 46 U.S.C. § 801 et seq.). The bill provided for loyalty contracts which were called "patronage contracts" and which section 2(14) defined as ". . . an agreement with a carrier or conference of such carriers by which a shipper obtains a lower rate by committing all or a fixed portion of its cargo to such carrier or conference. . . ." Ocean Shipping Act of 1979, Hearings before the Subcommittee on Merchant Marine and Tourism of the Senate Committee on Commerce, Science and

Transportation, 96th Cong., 1st Sess. 8 (1979). S. 1460 provided for approval of loyalty contracts prior to implementation and enumerated eight specific requirements for loyalty contracts. Permission to use a loyalty contract could be withdrawn if its use was found to be inconsistent with the bill's policies or requirements. Once a loyalty contract was approved, the bill provided for antitrust immunity for all actions to implement such a contract.

S. 1460, as introduced, also contained provisions which provided for a "right of independent action" under very limited circumstances. Carrier members of interconference agreements retained a right of independent action; carrier members of rate fixing agreements retained a right to serve U.S. ports not served by the agreement; and inland carriers retained the right to establish their portion of intermodal rates. S. 1460 also contained a provision which stated that conference agreements that contained a right of independent action on reasonable notice were presumed to be consistent with the policy of the bill. At this early point in the legislative process that culminated in the 1984 Act, there was no provision for service contracts.

In the second session of the 96th Congress, S. 1460 along with two other related bills[16] were superseded by S. 2585 which was reported from the Committee on Commerce, Science and Transportation and which passed the Senate by

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[16] S. 1462 and S. 1463 were introduced along with S. 1460 in the first session of the 96th Congress.

unanimous consent. With some minor changes, S. 2585 incorporated the provisions of S. 1460 with respect to loyalty contracts and independent action.

The Senate Report on S. 2585 explained that one of the purposes of the bill was to allow ". . . greater flexibility in the type of patronage contracts offered by carriers and conferences." S. Rep. No. 656, 96th Cong., 2d Sess. 2 (1980). The Report recognized that a dual rate system is a loyalty mechanism designed to tie shippers to the services provided by conference members. Id. at 5. The Report expressed dissatisfaction with the relative inflexibility of the existing dual rate system and discussed the liberalization of that system. Id. at 21.

The Senate Report further explained that it rejected a broad mandatory right of independent action because ". . . requiring open conferences to permit all members to deviate from established rates by independent action would seriously weaken the ability of these conferences to maintain rate stability in the trades in which they operate." S. Rep. No. 656, 96th Cong., 2d Sess. 12. Moreover, in explaining the presumption in favor of conference agreements which did provide for independent action, the Report stated:

> Conference agreements will be presumptively approvable only if member lines are allowed to establish individual rates and charges which are independent of the ratemaking body's rates, rate standards and tariff recommendations. The presumption accorded conference agreements under (2) above does not apply to arrangements which expressly or implicitly permit the concerted establishment of an independently filed rate. The independence required by this provision applies to

> the formation of the rate as well as to its filing with the Commission. The right of independent action must be full and complete and is not present when member lines are confined to rates which are expressed as a percentage of the ratemaking body's rates. Member lines must be permitted to act independently upon giving such reasonable notice to the ratemaking body as the Federal Maritime Commission may prescribe or permit.

Id. at 23.

While S. 2585 is an early predecessor of the Shipping Act of 1984, it, as well as its accompanying report, does provide some indication as to Congressional thinking on the subject of loyalty contracts and independent action. First, the Senate recognized that a patronage or loyalty contract is something more than an ordinary tariff rate. The Report describes it as what it is, namely a shipper-tying device. Moreover, the elaborate regulatory scheme for approval and specific required provisions for loyalty contracts, while representing a liberalization of the then existing scheme, implicitly recognized the significant competitive and economic implications of loyalty contracts. Second, in discussing independent action, the Report refers to "individual rates and charges," "independently filed rate," and "ratemaking body's rates." Independent action was not tied to "patronage contracts" and was never mentioned in the context of patronage contracts. The Report suggests that the Senate had in mind ordinary tariff rates when it considered independent action.

(2) House Consideration

On July 12, 1979, Representative Murphy introduced H.R. 4769, a bill to revitalize maritime policy. Section 202(8) defined a "loyalty contract" as one which provides "lower rates to shippers or consignees who agree to give a fixed portion of their cargo to such carrier or conference." Omnibus Maritime Bill - Part I, Hearings on H.R. 4769 before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 10 (1979). Section 205 of the bill set forth ten requirements for loyalty contracts and authorized the Commission to establish guidelines regarding loyalty contracts. Section 203(2) conferred express antitrust immunity. Section 207(b)(2) provided for a limited right of independent action in the case of conferences serving different trades and for inland carriers in intermodal arrangements. There was no provision in the bill for service contracts.

On March 24, 1980, in the second session of the 96th Congress, Representative Murphy introduced H.R. 6899, a bill which incorporated much of H.R. 4769. The treatment of loyalty contracts remained substantially unchanged except for two modifications. The provision for Commission authority to establish guidelines for loyalty contracts was deleted. And section 209(a)(1) set forth a requirement that "sample copies of any loyalty contract" be filed in a tariff. See Omnibus Maritime Regulatory Reform, Revitalization and Reorganization Act of 1980, Hearing before the Subcommittee on Monopolies and Commercial Law of

the House Committee on the Judiciary, 96th Cong., 2d Sess. 23 (1980). H.R. 6899 also made a significant change in the right of independent action. Section 207(b)(2)(A) required that conferences provide for such a right upon 60 days' notice.

Subsequently, several additional changes were made in H.R. 6899. Section 207(b)(2)(A) of the bill reported from the Committee on Merchant Marine and Fisheries on May 9, 1980, lengthened the period of notice for independent action from 60 to 90 days. The House Report which accompanied the May 9th version of the bill explained the mandatory right of independent action as follows:

> A mandatory right of independent action guarantees each member the right to charge its own rates if it does not agree with those charged by the conference. A member exercising this right would, in effect, be an independent within the conference.

H.R. Rep. No. 935 (Part I), 96th Cong., 2d Sess. 30 (1980). The Report further explained that a 90-day notice period was provided in order to ensure greater stability in conference rates. Id. at 31. Finally, the Report explained that this version allowed loyalty contracts to be used without the need for case-by-case approval by the Commission. Id. at 70.

However, section 205(a) of H.R. 6899, as reported from the Committee on the Judiciary on June 20, 1980, restored the requirement that loyalty contracts be approved by the Commission. H.R. Rep. No. 935 (Part 3), 96th Cong., 2d Sess. 5 (1980). This requirement remained when the bill was

reported from the Committee on Ways and Means on July 21, 1980.

Looking at the legislative proposals in the House in the 96th Congress it is again evident that, as with the Senate bills, loyalty contracts were seen as different in kind from an ordinary tariff rate. Loyalty contracts were to be subject to an approval process and specific statutory requirements. Moreover, the House discussion of independent action also is in the context of a divergence from a conference tariff rate.

(b) The 97th Congress

(1) House Consideration

On August 4, 1981, Representative Biaggi introduced H.R. 4374, a bill to improve the international ocean transportation system of the United States. The bill, as introduced, proposed certain specific changes in the existing statutory scheme.

On June 16, 1982, an amended version of H.R. 4374 was reported from the Committee on Merchant Marine and Fisheries. The amended bill provided for a comprehensive revision of the existing scheme for the regulation of ocean shipping. This version of H.R. 4374 contained many of the features regarding loyalty contracts as found in earlier bills. A loyalty contract continued to be defined as one in which a shipper committed all or a fixed portion of its cargo to a carrier or conference. Section 6 of the bill contained a list of five contract requirements and a special

provision for intermodal loyalty contracts. Section 7(a)(2) exempted loyalty contracts from the antitrust laws. Section 8(a)(1) required that a sample copy of a loyalty contract be filed in a tariff.

This bill, however, contained two very significant new features. Section 4(d) of H.R. 4374 required that conferences provide for a mandatory right of independent action only if the conference actually utilized a loyalty contract. International Ocean Commerce Transportation, H.R. Rep. No. 611 (Part 1), 97th Cong., 2d Sess. 4 (1982). H.R. 4374 also specified more precisely what the right of independent action applied to, namely, "any rate or charge required to be filed under section 8." Id. In addition, the bill outlined certain procedural steps that were required in order to take independent action. Members had to request the conference "to amend a rate or charge." Id. (emphasis added). The conference had 30 days in which to make "the proposed amendment." Id. (emphasis added). And the member seeking the "amendment" had to request the conference to include in the conference tariff a separate entry for its account "as proposed in the amendment." Id. (emphasis added). The consistent use of the term "amendment" and the reference to amending "a rate or charge" suggests that H.R. 4374 intended that independent action be taken on ordinary tariff items. Moreover, there is no indication in H.R. 4374 that independent action could be taken for the purpose of offering an individual loyalty

contract. The independent action provision in H.R. 4374 also provided that the action would be filed in the conference tariff "for use by any member of the conference." Id.

A second new feature of H.R. 4374 was that it expressly provided for service contracts. Section 2(18) defined "service contract." And section 8(c) authorized the use of service contracts, required confidential filing and publication of essential terms. H.R. Rep. No. 611 (Part 1), 97th Cong., 2d Sess. 3, 6. The bill was silent on the extent to which conferences could control the use of service contracts.

The report of the Committee on Merchant Marine and Fisheries which accompanied this version of H.R. 4374 explained that both of these new features were intended to "balance" the enhanced power to be granted conferences: "This Committee believes that two recommendations contained in the shipper-carrier proposal - mandatory independent action and service contracts - provide appropriate balance to the necessary increased strength of the conferences and so has included them in H.R. 4374." H.R. Rep. No. 611 (Part 1), 97th Cong., 2d Sess. 24. The Report stated further that: "A mandatory right of independent action guarantees each conference member the right to charge its own rates if it does not agree with those charged by the conference." Id. at 25 (emphasis added). With respect to service contracts the Report explains that: "This authority to use

service contracts is not limited to those conferences that have loyalty contracts in effect." Id. at 38. Finally, the Report declares that ". . . while it is impossible to meet all the needs and demands of the diverse interests affected by this legislation, this bill is a marvel of accommodation." Id. at 29.

The bill thus introduced two new pro-shipper elements into the developing consensus over shipping legislation reforms. Independent action applied only in conferences that utilized loyalty contracts, whereas service contracts could be used along with loyalty contracts. The bill retained requirements for loyalty contracts although in a liberalized form.

Some further adjustments were made in H.R. 4374 when it was considered by the Committee on the Judiciary. As reported on July 30, 1982, section 4(d) of the bill for the first time used the key term "rate or service item" in describing what the right of independent action applied to. H.R. Rep. No. 611 (Part 2), 97th Cong., 2d Sess. 4 (1982). The bill, however, still spoke in terms of an "amendment" of a "rate or service item." Id.

The Judiciary Committee Report explained this change as follows:

> The sole change to this section was to strike the references to "charge" in subsection (d) and insert in lieu thereof the words "service item contained within a tariff." This change makes clear that the right of independent action extends to items of service as well as items of cost contained within a tariff. (Emphasis added).

H.R. Rep. No. 611 (Part 2), 97th Cong., 2d Sess. 31 (emphasis added). This is one of the more illuminating passages in the legislative history. It indicates that the key term "rate or service item" was intended to apply to individual tariff items. It supports the view that Congress had in mind the ordinary "items" of cost and service that appear in numbered tariff paragraphs rather than a tying device such as a loyalty contract.

After some further modifications in the bill, H.R. 4374 passed the House on September 15, 1982.

(2) Senate Consideration

On January 15, 1981, Senator Inouye introduced S. 125. With respect to its loyalty contract and independent action features, the bill was substantially the same as S. 1460 which Senator Inouye had introduced in the 96th Congress.

On August 3, 1981, Senator Gorton introduced S. 1593, the principal bill considered by the Senate in the 97th Congress. The bill continued to authorize loyalty contracts, regulate their terms, and provide for an antitrust exemption. As introduced, it did not provide for a right of independent action or for service contracts. These two features, however, were restored to S. 1593 as reported from the Committee on Commerce, Science and Transportation on May 25, 1982. The Report accompanying the bill explained the right of independent action as follows:

> Conferences utilizing loyalty contracts must grant their members the right of independent action with respect to rates and services ordinarily required to be specified in the applicable common carrier

> tariff by section 9(a). This statutory right of independent action, however, reaches only those services required to appear in the conference tariff.

S. Rep. No. 414, 97th Cong., 2d Sess. 30 (1982) (emphasis added). Again, the discussion is in terms of ordinary tariff items. There is no indication that the right of independent action could be used by a conference member to offer a loyalty contract. No further action was taken on this bill in the 97th Congress.

(c) The 98th Congress

(1) House Consideration

On March 3, 1983, Representative Biaggi introduced H.R. 1878. The bill authorized the use of loyalty contracts, set forth eight requirements for loyalty contracts, and exempted loyalty contracts from the antitrust laws. A right of independent action was mandated only in conferences using loyalty contracts and was allowed on "any rate or service item required to be filed under section 8," to be effective no later than 45 days after the initial request. Merchant Marine Miscellaneous - Part 2, Hearings before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine and Fisheries on the Shipping Act of 1983, 98th Cong., 1st Sess. 26 (1983). Service contracts were authorized subject to confidential filing and publication of essential terms. There was no express provision for conference control over the use of service contracts.

The Report of the Committee on Merchant Marine and Fisheries which accompanied the bill again stressed the goal

of achieving a balance to the enhanced power of conferences. H.R. Rep. No. 53 (Part 1), 98th Cong., 1st Sess. 15 (1983). The right of independent action was required only ". . . where the conference utilizes a loyalty contract, thus creating the internal balance which the entire act seeks to achieve." Id. at 16. On the other hand, loyalty contracts were seen as a conference tying device. Id. at 16. Finally, the report also noted that service contracts were also provided for in order to offset the strength granted to conferences. Id. at 17. In discussing the use of service contracts, the Report stated:

> This authority to use service contracts is not limited to those conferences that have loyalty contracts in effect. A conference could agree not to allow use of service contracts by its members. In that case, a carrier in a conference that had a loyalty contract could use the independent action provision of section 4(d) to institute a service contract to the extent the independent action relates to services and rates required to be filed in a tariff.

Id. at 34. While expressly stating that independent action could be used to offer a service contract, the Report is notably silent on the question of whether independent action could be used to offer a loyalty contract.

As reported from the House Committee on the Judiciary on July 1, 1983, H.R. 1878 contained a further significant change: the right of independent action was substantially broadened and made mandatory in all conferences whether or not they utilized a loyalty contract. Moreover, the required notice period was reduced to 10 days. Independent action could only be taken, however, when it resulted in a

decreased cost to a shipper. The Report explained that the shorter notice period was in the interest of greater pricing flexibility. H.R. Rep. No. 53 (Part 2), 98th Cong., 1st Sess. 27 (1983).

The differences between the two House Committees' treatment of independent action was resolved through further changes in the bill. The compromise provision reduced the notice period on rate reductions to two working days. A ten-day notice period was retained for independent action on any service item not related to price. In addition, the compromise of the two Committees radically changed the treatment of loyalty contracts.

> This expansion compromise amendment prohibits the use of loyalty contracts that would violate the antitrust laws. Consequently, the prior linkage between loyalty contracts and independent action no longer has any relevance or utility.
>
> * * *
>
> The compromise amendment substitutes a broader prohibition on loyalty contracts in section 9(b)(9) - carriers, either alone or in concert, would be prohibited from use of loyalty contracts, except in conformity with the antitrust laws.
>
> Under antitrust analysis, loyalty contracts involving a single carrier would probably be lawful unless the carrier had a very substantial market position. Any concerted use of loyalty contracts by carriers is likely to violate the antitrust laws.

129 Congressional Record H8124, 8125 (October 6, 1983). This version of the bill was passed by the House on October 17, 1983.

(2) Senate Consideration

On January 26, 1983, Senator Gorton introduced S. 47. The bill authorized and regulated loyalty contracts, provided for independent action in conferences that utilized a loyalty contract, and authorized service contracts. An identical bill, S. 504, was introduced by Senator Gorton on February 17, 1983.

The text of S. 47 as passed by the Senate on March 1, 1983, contained one further change in the right of independent action. In addition to requiring a right of independent action in conferences utilizing loyalty contracts, independent action was also mandated in any conference which served an OECD trade.

Notably, the Report from the Committee on Commerce, Science and Transportation to accompany S. 504 also spoke of the intention to balance the needs and interests of carriers and shippers. S. Rep. No. 3, 97th Cong., 1st Sess. 11 (1983).

(3) The Conference Committee

The difference between the House and Senate versions were resolved by the committee of conference of the two Houses and outlined in the Conference Report submitted on February 23, 1984. H.R. Rep. No. 600, 98th Cong., 2d Sess. (1984) ("Conference Report").

One important change made by the conference committee was that it closed the loophole of independent action on service contracts. Conferences were granted the authority to prohibit the use of loyalty contracts by their members.

The Conference Report contained the following extended discussion of independent action, loyalty contracts and service contracts.

> The independent action section (5(b)(8)) of the bill requires that each conference agreement provide for independent action on rates or service items required to be filed in a tariff under section 8(a) of the bill. The conferees agree that the notice period to be given to the conference before a member may take independent action cannot be more than ten calendar days. The House recedes from a provision that would have limited the notice period to 2 working days for independent action; the Senate recedes from a provision that would have limited independent action to certain trades and only when a loyalty contract is in effect. The conference bill makes it a prohibited act to use a loyalty agreement not in conformity with the antitrust laws.
>
> Section 8(a) does not require that service contracts be filed in a tariff. Consequently, section 5(b)(8) does not require conferences to permit their members a right of independent action on service contracts. The conferees agree that section 8(c) of the bill, which authorizes the use of service contracts, cannot be read as undermining the authority of a conference to limit or prohibit a conference member's exercise of a right of independent action on service contracts. However, conference agreements must permit independent action on time-volume rates in section 8(b), since time-volume rates must be filed under section 8(a).
>
> The net result is that a member of a conference does not have a statutory right to enter into a service contract in violation of the conference agreement. Under section 4(a)(7), the conference agreement may prohibit its members from entering into service contracts or it may allow them to enter into a service contract subject to such conditions as the conference may establish. Thus, while a conference agreement is not required to provide each member a right of independent action on service contracts, neither is it prohibited from doing so.
>
> Under the bill, a conference may enter into a service contract. If it does so, the individual members do not, under the bill, have a right of

> independent action to deviate from that service contract unless the conference agreement so provides.

H.R. Rep. No. 600, 98th Cong., 2d Sess. 29-30.

The Conference Report confirmed the intended purpose of the 1984 Act to create a broad right of independent action. The Senate bill would have limited to certain trades and only when a loyalty contract was in effect. It was thus clear that even in the Senate bill independent action was intended to introduce competition within a conference presumably to ameliorate the anticompetitive effect of authority to offer conference loyalty contracts. The final version adopted by the conferees removed the restrictions in the Senate bill and thus provided for an even stronger and broader right of independent action. At the same time, conference authority to offer a loyalty contract was weakened (if not in effect abolished) by making conference action on loyalty contracts subject to the antitrust laws.

The Conference Report also compared the treatment of service contracts under the Act and confirmed what is clear in the language of the Act, namely, that conferences may control or prohibit the use of service contracts. The conference committee also closed the loophole of independent action on service contracts and allowed conferences to prohibit the taking of independent action to offer a service contract. There is no suggestion in the Conference Report that independent action could be applied to loyalty contracts. Moreover, it would be inconsistent with the

action taken to allow conferences to control independent action on service contracts to interpret silence on this issue as allowing independent action on loyalty contracts.

The cumulative weight of the legislative history of the 1984 Act as it unfolds through three Congresses supports the conclusion that independent action was not intended to apply to loyalty contracts. This conclusion is supported in the first instance by the development and refinement of the subject matter of independent action. Early legislative proposals spoke merely of a right of independent action and did not precisely define its subject matter. Gradually the concept of independent action on "rate or service items required to be filed in a tariff" emerged. At first only rates or charges were specified. Then the term was further clarified to ensure that it covered tariffed service items.

Throughout this evolutionary process, both the language of the various bills and the discussions in the reports support the view that the legislators had in mind ordinary rate or service items in a tariff. Independent action was contemplated as a divergence from a specific conference tariff item. In addition to this affirmative evidence, there is the fact that nowhere in the legislative history is there any hint that a loyalty contract could be considered a "rate or service item required to be filed in a tariff" and thereby subject to independent action.

Moreover, whenever the Congress considered or discussed a loyalty contract, it is clear that it thought of it as

something quite distinct and apart from a tariff item. A loyalty contract was always recognized as a tying device whose basic purpose was to strengthen conference power. In fact, the original proposals required independent action only in those conferences which utilized a loyalty contract as a means of offsetting conference power. Again there was never any suggestion that an individual conference member could use independent action for the purpose of offering its own loyalty contracts. Moreover, to have allowed independent action for the purpose of offering an individual loyalty contract would have been contrary to the very purpose of authorizing conference loyalty contracts in the legislative scheme then contemplated.

Loyalty contracts were accorded special legislative treatment. There were requirements as to contract terms, approval by the Commission, and antitrust immunity. In the end, all of the regulatory features were stripped away along with antitrust immunity and in its place was substituted a flat prohibition on the use of loyalty contracts except in conformity with the antitrust laws. The whole process, however, illustrates the fact that both in regulatory and economic terms, loyalty contracts were seen as something quite different from an ordinary tariffed rate. Thus, the most harmonious reading of that legislative history is that Congress never intended that a loyalty contract be regarded as a "rate or service item" within the meaning of section 5(b)(8).

3. The Objectives and Purposes of the 1984 Act

One theme that emerges from the legislative history of the 1984 Act is the effort on the part of Congress to balance the conflicting interests of carriers and shippers. The various reports of both Houses reiterate that this was one of the fundamental purposes of the 1984 Act. A resolution of the conflicting demands of carriers and shippers was not finally achieved until the Conference Committee worked out final changes in the independent action, loyalty contract and service contract provisions of the Act. The 1984 Act represents a finely crafted balancing of carrier and shipper interests, especially with regard to these key provisions.

Both carriers and shippers were actively engaged in the legislative process. Each obtained certain features that it sought. Carriers received a clearly defined antitrust immunity, intermodal authority, expedited processing of agreements under a relaxed general standard, and clear direction to enter into innovative arrangements to rationalize and improve the delivery of liner shipping services. Shippers, on the other hand, obtained the benefit of a broad mandatory right of independent action, of service contracts, and of the ability to form shippers' associations.

In the final compromise, the use of loyalty contracts were retained but antitrust immunity and any express requirements as to their terms were eliminated. As a

practical matter, loyalty contracts were removed as a conference marketing device. Carriers obtained express authority to control service contracts, including independent action on service contracts. Shippers benefitted from a mandatory right of independent action in all conferences.

Proponents have argued that the authority to control the use of service contracts was a key feature of the final legislative compromise and a crucial element of the statutory scheme. They have also argued that loyalty contracts are merely a type of service contract and therefore should be treated in the same manner. While, as discussed above, this latter contention cannot stand in the face of the statute's clear distinction between loyalty contracts and service contracts, there is considerable merit to the position that allowing independent action on loyalty contracts would create a loophole in the statutory scheme that would vitiate the authority which Congress had granted to conferences to control independent action on service contracts. To allow independent action on loyalty contracts would mean that conference members could shift their service offerings from service contracts to loyalty contracts and evade conference control. Thus, the final point gained by conferences in the legislative compromise, i.e., control of service contracts, could become a hollow authority indeed.

Allowing individual conference members to exercise independent action on loyalty contracts would thus undermine

one of the fundamental purposes of the Act, by upsetting the balance of carrier and shipper interests in the crucial area of contract carriage. One principle of statutory construction is that a statute should be construed in a manner that renders it effective in terms of its fundamental purposes. Interpretations should be avoided which would render such purposes more difficult to fulfillment. National Petroleum Refiners Association v. FTC, 482 F.2d 672, 689 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974). Nor should a statute be construed in a manner, which would undermine Congress' broad purposes for enacting the legislation. Planned Parenthood Fed. of America v. Heckler, 712 F.2d 650 (D.C. Cir. 1983). Rather a statute should be read to effectuate its purposes rather than to frustrate them. Motor Vehicle Manufacturers v. Ruckelshaus, 719 F.2d 1159 (D.C. Cir. 1983).

Based on an examination of the overall statutory scheme, it would appear that allowing independent action on loyalty contracts would upset the balance intended by Congress. By the mere expedient of changing the service commitment from a fixed quantity to a percentage, a member could offer its own loyalty contract and conferences would lose all control over the contract arrangements of their members. Nothing in the language or history of 1984 Act supports the view that Congress deliberately eliminated independent action on service contracts and at the same time intended that independent action apply to loyalty contracts

and thereby produce the same result. However, it is consistent with the objectives of the Act to determine that a loyalty contract is not a rate or service item and therefore is not subject to the mandatory right of independent action.

D. Refusal to Deal

The Commission's Orders to Show Cause also questioned whether the conference agreement provisions constitute a refusal to deal. Hearing Counsel treated it most fully in its pleadings. Others examined it with varying degrees of thoroughness. DOJ did not comment on possible violation of sections 5(b)(5), 10(a)(3) and 10(c)(1) and did not argue that the conference provisions constituted an unlawful refusal to deal. The issue seemed to be virtually abandoned at oral argument.

Having determined that the conference provisions do not violate section 5(b)(8), we do not believe that the refusal to deal issue survives on its own as a separate and distinct violation. It is therefore not necessary to address this issue in light of the disposition of the independent action issue.

CONCLUSION

The Commission concludes that the disputed agreement provisions are not unlawful. This conclusion is based on the determination that a loyalty contract is not a "rate or service item" within the meaning of section 5(b)(8) of the

Act. This ruling is based upon the following analysis of the language, legislative history, and purposes of the 1984 Act.

1. The language of the 1984 Act contemplates a mandatory right of independent action on ordinary rate or service items offered by carriers in their tariffs and does not apply to a loyalty contract, a form of commercial tying device which involves both a carrier offer of a rate or service and a shipper commitment, and which has significantly different economic consequences. Moreover, the right of adopting independent action, whether exercised by one or several conference members, functions properly in the context of ordinary tariffed rate or service items but leads to practical and possibly legal difficulties in the context of loyalty contracts.

2. The legislative history of the 1984 Act indicates that Congress intended that the mandatory right of independent action apply to ordinary tariffed items, and not to loyalty contracts. Loyalty contracts were always seen as a special device for marketing ocean transportation services that required special regulatory treatment. The final compromise which became the 1984 Act left loyalty contracts subject to the antitrust laws and granted conferences authority to control the use of service contracts as well as independent action on service contracts. There is no indication whatever in the legislative history of any intent to have independent action apply to loyalty contracts.

3. The overall objective of the 1984 Act of balancing carrier and shipper interests through the independent action, service contract and other provisions is best preserved by an interpretation that independent action does not apply to loyalty contracts. Application of independent action to loyalty contracts would undermine the statutory scheme established by Congress when it authorized conferences to control the exercise of independent action on service contracts.

The Commission therefore concludes that the provisions at issue in these proceedings in the agreements of the Transpacific Westbound Rate Agreement (Agreement No. 202-010689-027), the North Europe-U.S. Pacific Freight Conference (Agreement No. 202-000093-040), the Gulf-European Freight Association (Agreement No. 202-010270-024, as subsequently amended), the North Europe-U.S. Gulf Freight Association (Agreement No. 202-010656-024, as subsequently amended), the U.S. Atlantic-North Europe Conference (Agreement No. 202-010636-028, as subsequently amended), and the North Europe-U.S. Atlantic Conference (Agreement No. 202-010637-025, as subsequently amended) have not been shown to be unlawful under the Shipping Act of 1984.

THEREFORE, IT IS ORDERED, That these consolidated proceedings are discontinued.

By the Commission.

Joseph C. Polking
Secretary